91-1611

Supreme Court, U.S.
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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DON GLADDEN,

Petitioner

VS.

JOSHUA INDEPENDENT
SCHOOL DISTRICT, ET AL

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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April, 1992

QUESTIONS PRESENTED

1. Does the "break in causation" rationale rejected in Malley v. Briggs, 475 U.S. 335, 344 n.7 (1986) continue to insulate state actors and governmental entities from liability under 42 U.S.C. Section 1983, when there has been an intervening but erroneous determination of probable cause by a police officer and prosecutor?

2. Under Rule 11 of the Federal Rules of Civil Procedure, is the filing of a complaint based upon legal theory endorsed by one Federal Court of Appeals and the United States Supreme Court, but foreclosed by binding precedent within the Circuit in which it is filed, warranted by "existing law" or "a good faith argument for the extension, modification or reversal of existing law?"

LIST OF PARTIES

Petitioner from Judgment Below

Don Gladden

Respondents

Joshua Independent School District;
Charles Greenawalt;
Larry Loftin;
Francesca Raines;
Royce Ingersoll;
Institute of Criminal and Civil Investigations;
Security Associates International;

Police Officer David Stevens, a defendant below, is viewed by Petitioner as no longer having an interest in the present proceedings.

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APPENDICES:

This petition is one of two petitions for a writ of certiorari, filed contemporaneously, which seek review of the same judgment below. The Petitioner herein, and William F. Jennings, the petitioner in the separately filed but related petition in this case, have filed a Joint Appendix to be used in the consideration and disposition of their petitions. That Joint Appendix is indexed as follows:

Jennings v. Joshua Independent School District, 948 F.2d 194 (5th Cir. 1991) 1a

Judgment and Memorandum Opinion of District Court Imposing Rule 11 Sanctions (January 5, 1988) 10a

Jennings v. Joshua Independent School District, 869 F.2d 870 (5th Cir. 1989) 27a

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Judgment and Opinion of the Court of Appeals Denying Petitioner's Motion to Recall Mandate (August 2, 1990) 51a

Judgment of the Court of Appeals Denying Petitioner's Petition for Panel Rehearing (January 9, 1992) 54a

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner herein prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review that Court's December 10, 1991 Judgment and Order in this proceeding.

OPINIONS BELOW

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit from which review is sought, are reported at 948 F.2d 194 (5th Cir. 1991), and are attached in the Appendix to this Petition at page 1a.

The Judgment and Memorandum Opinion of the United States District Court for the Northern District of Texas entered January 5, 1988, and from which Petitioner previously appealed, are not reported but are attached in the Appendix of this Petition at page 10a.

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit on the first appeal in this cause are reported at 869 F.2d 870 (5th Cir. 1989), and are attached in the Appendix to this Petition at page 27a.

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit on Petition for Panel Rehearing, in which the Court modified its prior decision on grounds not relevant to consideration of the instant Petition, are reported at 877 F.2d 313 (5th Cir. 1989), and are attached in the Appendix to this Petition at page 43a.[1]

The Order of the United States District Court for the Northern District of Texas entered October 19, 1990, from which Petitioner appealed, is not reported but is attached in the Appendix to this Petition at page 46a.

The Order of the United States District Court for the Northern District of Texas entered October 26, 1990, which

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[1]The indented paragraphs reported at 877 F.2d 321-22 constitute the only modification of the Court's prior decision reported at 869 F.2d 870.

denied Petitioner's Motion to Alter or Amend the District Court's Judgment entered October 19, 1990, is not reported but is attached in the Appendix to the Petition at page 50a.

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered August 2, 1990, which denied Petitioner's Motion to Recall the Mandate, are not reported but are attached in Appendix to this Petition at page 51a.

The Judgment of the United States Court of Appeals for the Fifth Circuit, which denied Petitioner's Petition for Panel Rehearing on January 9, 1992, is not reported but is attached in the Appendix to this Petition at page 54a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered the Judgment

from which review is sought December 10, 1991. Jurisdiction is now conferred upon this Court by 28 U.S.C. Section 1254(1).[2]

STATUTES AND RULES INVOLVED

Section 1983, Title 42, United States Code provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

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[2]The time for filing this petition for writ of certiorari began to run on January 9, 1992, the date of the denial of Petitioner's timely petition for rehearing in the Court of Appeals. See Sup.Ct.R. 13.4, (1991).

Rule 11 of the Federal Rules of Civil Procedure provides in parts pertinent to this petition:

> Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated .... The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause the cost of litigation.... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

STATEMENT OF THE CASE

The basis of this litigation stems from the use of "sniffer dogs" by public school officials to detect contraband in vehicles located on the school's parking lot. In 1984, the Board of Trustees of the Joshua Independent School District (J.I.S.D.) voted to develop a program to educate its students on the dangers of drugs, alcohol and weapons, and to deter students from bringing any of these items to school. It then entered into a contract with Security Associates International (S.A.I.), a private company engaged in the business of training canines to "sniff" for contraband.[3] Both

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[3]The agent designated by SAI to carry out the contract (with dogs trained by SAI) was the Institute for Criminal & Civil Investigations (ICCI). This Company, owned by Mr. Royce Ingersoll, solicited clients for SAI and, with respect to JISD, entered into the contract on SAI's behalf.

before and after the School Board's action of entering into this contract, its members knew that the dogs to be used were trained to react to the scents of at least sixty-two different substances, including aspirin, caffeine, and a number of other safe over-the-counter drugs. The Board was also aware that these dogs would alert to the lingering residual scents of such substances "for up to four to six weeks." Pet. App. at page 33a, 869 F.2d at 874. With the assurances of SAI, however, the School Board reached the conclusion that "alerts" by these dogs were, in and of themselves, sufficient to warrant police involvement, and that "[t]he canines [would] be used to establish probable cause for a search warrant and subsequent forcible entry" into the vehicles of non-consenting students.

On March 29, 1985, pursuant to the above J.I.S.D. policy, and solely on the basis of a dog's alert, J.I.S.D. officials called the police to assist in gaining entry into the automobile of Mr. William F. Jennings ("Jennings"), whose daughter had driven it to school. Officer Stevens was dispatched to the school parking lot, and at the behest of the school officials, obtained a search warrant, conducted a thorough search of the interior and trunk of Jennings' vehicle, and found nothing.

On August 29, 1985, Jennings, on behalf of himself and his minor daughter Naomi, brought this suit pursuant to 42 U.S.C. section 1983 alleging that the Respondents, by their actions in contacting and communicating with the police for the purpose of causing a search of the Jennings' automobile, had

"caused" the unconstitutional search performed by Officer Stevens in violation of rights guaranteed Jennings and his daughter by the Fourth and Fourteenth Amendments to the United States Constitution.

Following a five day trial, but without reaching the issue of whether the search of Jennings' automobile violated the Fourth Amendment, the District Court directed verdicts in favor of each of the Respondents. The District Court thereafter imposed sanctions jointly and severally against Jennings and his attorney, the Petitioner herein, in the amount of $84,113.01 pursuant to Rule 11 of the Federal Rules of Civil Procedure.

In the Fifth Circuit Court of Appeals, a panel composed of Judges Jolly, Garwood and Wisdom, again without reaching the question of whether the search of the

Jennings' vehicle by Officer Stevens was unconstitutional, affirmed the District Court's decision that the conduct of the school officials was not the "legal cause" of the ensuing search by Stevens. With respect to the District Court's decision to impose sanctions pursuant to Rule 11, the Court of Appeals also ruled the District Court had not abused its discretion in finding the Petitioner's "legal theories" of section 1983 causation frivolous, but, on Petition for Rehearing, the Court by order dated June 19, 1989, remanded the case to the District Court for further consideration regarding the amount of the sanctions to be imposed. Pet. App. at page 44a, 877 F.2d at 321-322.

On September 15, 1989, Petitioner filed a Petition for Writ of Certiorari in the United States Supreme Court. The

Supreme Court denied the Petition for Writ of Certiorari on June 18, 1990.[4]

On June 26, 1990, citing the Fifth Circuit's intervening decision in Hale v. Fish, 899 F.2d 390, 401 (5th Cir. 1990), and again referring the panel to the Supreme Court's rejection of the "break in causation" rationale in Malley v. Briggs, 475 U.S. 335, 344 n.7 (1986), the Petitioner filed a Motion to Recall Mandate in the Court of Appeals. By unpublished memorandum opinion dated August 2, 1990, the panel adhered to the "break in causation" rationale expressly rejected in Malley v. Briggs, supra, and denied the Petitioner's Motion to Recall Mandate. Pet. App. at pages 51a-53a.

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[4]This prior denial of certiorari does not effect consideration of the questions presented by the instant petition or foreclose consideration of "questions determined in the earlier stages of the litigation." Mercer v. Theriot, 377 U.S. 152, 153 (1964).

On August 14, 1990 Petitioner filed a motion for leave to file a suggestion for rehearing in banc on the panel's August 2, 1990 decision denying Petitioner's Motion to Recall Mandate. By unpublished order dated August 22, 1990, Petitioner's motion for leave was denied by Judge Jolly, sitting in chambers.

On remand pursuant to the Court of Appeals decision on rehearing entered June 19, 1989, the District Court in an order entered October 18, 1990, reduced by exactly one-half (to $42,056.51) the amount of the joint and several imposition of Rule 11 sanctions against the Petitioner and his client. Pet. App. at page 49a.

On appeal of the District Court's Order imposing Rule 11 sanctions after remand, the Court of Appeals found the

District Court abused its discretion in failing to follow the Court of Appeals mandate. Pet. App. at pages 7a-8a, 948 F.2d at 199. However, rather than remand the case to the District Court, the Court of Appeals vacated the District Court's order and rendered judgment imposing Rule 11 sanctions, jointly and severally, against Petitioner and his client in the amount of $21,539.95. Pet. App. at pages 8a-9a.

The Petitioner and his client on December 24, 1991, jointly filed a Petition for Rehearing by the panel, and Petitioner's client, William F. Jennings, separately filed a Suggestion for Rehearing In Banc. The Petition for Rehearing and Suggestion for Rehearing In Banc were denied by the Court of Appeals in an order entered January 9, 1992. Pet. App. at pages 54a-55a.

The present Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The continuing adherence of the Fifth Circuit Court of Appeals to the insulation doctrine directly conflicts with the decision of the Supreme Court in Malley v. Briggs 475 U.S. 335, 344 n.7 (1986).

Prior to the Supreme Court's decision in Malley v. Briggs, 475 U.S. 335 (1986), the Fifth Circuit Court of Appeals promulgated what became known as the "break in causation" or "insulation" doctrine of causation. Under this doctrine, state actors who without probable cause set in motion a series of events leading to an unconstitutional arrest or search, nonetheless remain "insulated" from liability under 42 U.S.C. Section 1983 if they can show that a subsequent state actor in the chain of prosecution made the same erroneous

determination of probable cause. As the Fifth Circuit explained the doctrine:

> ...if the facts supporting an arrest are put before an intermediate such as a magistrate or grand jury, the intermediate's decision breaks the causal chain and insulates an initiating party. Rodriguez v. Ritchey, 556 F.2d 1185, 1193 (5th Cir. 1977) (en banc).

In the instant case, Petitioner alleged that the Respondents' acts of "turning the matter completely over to the police" for the purpose of causing a search of student automobiles, without reasonable suspicion or probable cause, satisfied the causation requirement of 42 U.S.C. Section 1983. While the Court of Appeals recognized that no dispute existed regarding whether the alleged actions of Respondents were performed in accordance with and pursuant to official school policy, Pet. App. page 28a, 869 F.2d at 871, it nonetheless rejected

Petitioner's contention that the issuance of the invalid search warrant (and the unconstitutional search by Officer Stevens which ensued) was a "natural consequence" of the actions of the school officials. Summarizing the basis of its ruling the Court of Appeals stated:

> Though the school officials contacted the police, their actions cannot be said to have been the legal cause of any subsequent deprivation of [Jennings'] fourth amendment rights. Officer Stevens made an independent investigation when he reached the school parking lot; the County attorney, after review, authorized the application for the warrant; and the judge then made his own independent determination of probable cause based on the information Officer Stevens had gathered and on the affidavit drawn up by the County attorney. Pet. App. at page 31a, 869 F.2d at 873.

As stated in its subsequent denial of Petitioner's Motion to Recall Mandate, the legal premise for the Court of Appeals rejection of the Petitioner's theory of causation was, in short, that:

> [T]here was no basis for Section 1983 liability on the part of [the School District or] school officials, because actions by an intervening actor (a policeman) broke any causal chain between their acts and the ultimate issuance of the allegedly unconstitutional search warrant. Pet. App. at 52a.

In Malley v. Briggs, supra, the Supreme Court expressly rejected the foregoing formulation of Section 1983 causation, stating:

> Petitioner [Malley] has not pressed the argument that in a case like this the officer should not be liable because the judges decision to issue the warrant breaks the causal chain between the application for the warrant and the improvident arrest. It should be clear, however, that the district court's "no causation" rationale in this case is inconsistent with our interpretation of section 1983. As we stated in Monroe v. Pape, 365 U.S. 167, 187 (1961), section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read section 1983 as recognizing the same causal link. Id., 475 U.S. at 344 n.7.

Footnote seven in Malley v. Briggs was intended to convey to the lower courts the Supreme Court's rejection of the "no causation" rationale adopted by the Fifth Circuit in Rodriguez v. Ritchey. Justice White, the author of the Supreme Court's decision in Malley, had previously questioned the validity of Rodriguez's "break in causation" rationale in his dissent from denial of certiorari in Smith v. Gonzales, 459 U.S. 1005 (1982), and it is plain that footnote seven can only be viewed as affirming the First Circuit's express rejection of Rodriguez v. Ritchey in its decision below, Briggs v. Malley, 748 F.2d 715, 720-721 (1st Cir. 1985), wherein the First Circuit, while purporting to "dispos[e] of the Fifth Circuit's 'chain of causation' approach," stated:

> The 'chain of causation' theory does not withstand scrutiny. If we use the tort concept of 'but for' cause to determine when a causal connection is present, it seems clear that 'but for' the police officer's submission of the warrant to the magistrate, the warrant would not issue and the search or arrest would not occur. It is the decision of the police officer to bring the matter to the magistrate that is the active cause of the search or arrest. Where that decision is the result of negligence, i.e., failure to exercise a modicum of judgment about the presence of probable cause, that negligence is the cause of the improper search or arrest."

The direct, "vertical" conflict created by the Fifth Circuit's decision to adhere to its "break in causation" rationale, notwithstanding the Supreme Court's decision in Malley, has left the District Courts within the Fifth Circuit uncertain whether they are to follow the decisions of the Supreme Court or those of the Fifth Circuit with regard to the "no causation" rationale. In Hamerick v. City of Eustace, 732 F.Supp. 1390 (E.D.

Tex. 1990), for example, the District Court noted the "apparent conflict" between the Supreme Court's decision in Malley and the Fifth Circuit's continuing adherence to the "break in causation" rationale. Id., 732 F.Supp. at 1396 n.3. In Hamerick the District Court avoided having to choose between existing Supreme Court and Fifth Circuit authority only after charitably observing that "[i]t is possible that the Fifth Circuit concluded that Malley was inapplicable for some reason or that Malley was somehow distinguishable." Ibid.

In light of this Court's decision in Malley, the decision of the Court of Appeals in the instant case is erroneous at best. If a magistrate's intervening determination of probable cause fails to

break the causal chain, as this Court held in Malley, it is ludicrous for the Fifth Circuit to hold that a police officer or prosecutor's erroneous determination of probable cause insulates the initiating party, here a public school district and its agents, from liability. Pet. App. at page 52a. Petitioner believes this indefensible departure by the Court of Appeals from Malley v. Briggs merits the Supreme Court's immediate attention. See Smith v. Gonzales, 459 U.S. 1005-1007 (1982) (White, J., dissenting from denial of certiorari) (urging the Court "to resolve THIS significant, recurring question") (emphasis added).

II. A direct conflict exists between the decisional law of the First Circuit Court of Appeals, which follows the theory of causation affirmed in Malley v. Briggs, and the decisional law of other Courts of Appeals, including the Fifth Circuit, which continue to apply the "break in causation" rationale.

While it may have been "clear" to the Supreme Court that the "no causation" rationale "is inconsistent with [its] interpretation of Section 1983," 475 U.S. at 344 n.7, since the Malley decision the Courts of Appeals for the Fifth, Ninth and Eleventh Circuits have continued to adhere to the break in causation doctrine. See Smiddy v. Varney, 803 F.2d 1469, 1472 (9th Cir. 1986) (finding "no inconsistency" between continued application of the insulation doctrine and Malley); Barts v. Joyner, 865 F.2d 1187, 1195 (11th Cir. 1989) ("[t]he intervening acts of the prosecutor, grand jury, judge and jury...each break the

chain of causation unless Plaintiff can show...deception or undue pressure by the defendant policeman."); see also, Id. at 1196 ("Malley never considered the question whether...independent decisions of prosecutors, juries and judges to prosecute...would break the chain of causation"); Hand v. Gary, 838 F.2d 1420, 1427-28 (5th Cir. 1988) ("intermediary's 'independent' decision 'breaks the causal chain' and insulates the initiating party"); cf., Borunda v. Richmond, 885 F.2d 1384, 1390 (9th Cir. 1988) (police officers "may be insulated from liability for damages subsequent to [an] unlawful arrest" where a prosecutor has "exercised independent judgment in determining that probable cause for an arrest exists").

The Court of Appeals for the First Circuit, however, based on the "natural consequences" theory of causation

affirmed by the Supreme Court in Malley v. Briggs, has "dispose[d] of the Fifth Circuit's 'chain of causation' approach," Briggs v. Malley, 748 F.2d at 720, and has continued to reject the "break in causation" rationale. In Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553 (1st Cir. 1989), for example, the First Circuit held that under 42 U.S.C. Section 1983:

> [A]n actor is responsible for those consequences attributable to reasonably foreseeable intervening forces, including the acts of third parties. A negligent defendant will not be relieved of liability by an intervening cause that was reasonably foreseeable, even if the intervening force may have directly caused the harm. An "unforeseen and abnormal" intervention, on the other hand, "breaks the chain of causality," thus shielding the defendant from liability. Id., 882 F.2d at 561 (internal citations omitted).

The conflict between the Courts of Appeals regarding whether a per se "break

in causation" rationale survives Malley v. Briggs is not a conflict that can tolerably be permitted to exist any longer. At least one District Court within the Fifth Circuit has noted the "apparent conflict" between the Fifth Circuit and the Supreme Court on this question, see Hamerick v. City of Eustace, 732 F.Supp. 1390, 1396 n.3 (E.D. Tex. 1990), and the Petitioner's reward for bringing this "apparent conflict" to the attention of the Fifth Circuit and the District Court below, and for relying on binding Supreme Court precedent when negotiating this "apparent conflict," is a massive, punitive Rule 11 sanction imposed against both the Petitioner and his client.

III. Imposition of Rule 11 sanctions to deter litigation of issues on which there is an inter-circuit split in authority undermines the power of the Supreme Court to maintain uniformity in decisional law among the Courts of Appeals, and operates to create an improper "chilling" effect prohibited by Rule 11 itself.

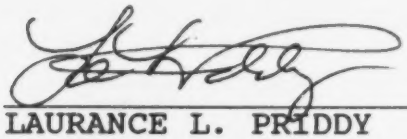
A denial of certiorari in this case will not only underline the fact that the federal law is being administered in different ways in different parts of the country but will also operate to further encourage the improper use of sanctions "to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." Advisory Committee Note to Federal Rule of Civil Procedure 11, 97 F.R.D. 198,199 (1983).

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the December 10, 1991 Judgment and

Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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